RAFFLES HOTEL LTD. v. MALAYAN BANKING LTD. (NO. 2)

[O.C.J. (Winslow J.) December 31, 1964]

[Singapore — Suit No. 942 of 1964]

Company Law — Lessee company carrying on hotel business — Lessor bank appointing itself as director of lessee company — Whether articles of lessee company operate as a contract between the lessors and their assigns — Whether articles of lessee company should be read subject to terms of lease — Whether lessor bank interested in or carrying on similar business to that of lessees — Whether appointment valid.

Landlord and tenant — Lease — Covenants and conditions of lease — Compliance with.

In July 1933 the benefit of the lease of the land on which part of the building known as Raffles Hotel stands was assigned to the plaintiff company for the remainder of the unexpired term of 70 years subject to all the covenants and conditions contained in the original lease. Subsequently in 1963 the defendant company acquired the leasehold reversion of the said land subject to and with the benefit of the original lease. The defendant company were thus in the position of lessors and the plaintiff company lessees thereof.

Clause 14 of the original lease provided that the lessee should not without the previous licence in writing of the lessors assign or sublet the premises or any part thereof, such licence not to be unreasonably withheld. It also provided that if the assignee or sub-lessee be a limited company no consent shall be given unless the articles contained a provision that from time to time during the continuance of the demise the lessors shall have power to appoint a director not subject to retirement by rotation, but any director so appointed shall not be a person interested in or connected with any business of a similar nature to the lessees.

Article 77 of the articles of association of the plaintiff company provided that the lessors may appoint themselves or one of them or any other person to be a director of the company. The defendant company in pursuance of the said article purported to appoint themselves as director of the plaintiff company and the plaintiff company sought declarations that article 77 must be read in conjunction with clause 14 of the lease and that the defendant bank's appointment as a director pursuant to article 77 was invalid and alternatively for a declaration that the defendant bank cannot act as a director of the plaintiff company and an injunction to restrain the defendant bank from purporting to act as such director.

Held: (1) article 77 did not operate as a contract with the lessors and their assigns and therefore did not confer any contractual right on the defendant bank to appoint itself as director to serve on the plaintiff company's board;

(2) clause 14 of the lease did not confer or impose any contractual right or obligation on either the lessors or lessees. It did not constitute an absolute covenant but merely one which is conditionally binding on the lessees and they cannot assign or sublet the property in question without the consent of the lessor and unless such consent was required no such provision need be made;

(3) even if the defendant bank had a right tc appoint itself as director it was disqualified under clause 14 of the lease from acting as director, as it was interested in and connected with a similar business to that of the lessees.

Cases referred to:—

(1) *Eley* v. *Positive Government Security Life Assurance Co. Ltd.* (1875) 1 Ex. 20.

(2) *Browne* v. *La Trinidad* (1888) 37 Ch. D. 14.

(3) *Hickman* v. *Kent* [1915] 1 Ch. 897.

(4) *British Murac Syndicate Ltd.* v. *Alperton Rubber Co. Ltd.* [1915] 2 Ch. 186.

(5) *In re Anglo-Austrian Printing & Publishing Union* [1892] 2 Ch. 158.

(6) *Ex parte Cannon* (1885) 30 Ch. 629.

(7) *Treloar* v. *Bigge*, 9 Ex. Cas. 151.

(8) *Lapiah* v. *Braithwaite* [1926] A.C. 275.

(9) *Todd* v. *Robinson* (1884) 14 Q.B.D. 739.

(10) *Gophir Diamond Co.* v. *Wood* [1902] 1 Ch. 950.

SUIT.

S. E. Teh and M. Karthigesu for the plaintiff.

G. S. Hill for the defendant.

Cur. Adv. Vult.

Winslow J.: An *ex parte* interim injunction having been granted on 15th June, 1964 restraining the defendant bank from exercising its powers as a director of the plaintiff company, a motion to continue that injunction came up for hearing before me which I granted on 13th October, 1964* on the usual undertaking by the plaintiff company as to damages in the event of failure at the trial.

By some strange coincidence, the trial of this action was also fixed for hearing before me on 2nd and 3rd December, 1964 and I now have to decide whether any new argument has been advanced or any fresh evidence adduced which would make me want to change the tentative opinion which I originally formed for the purposes of deciding whether there was in fact a triable issue.

Before dealing with the law it may be useful for me to set out briefly the undisputed facts.

The leasehold reversion of part of the land on which the present Raffles Hotel, Singapore stands is now owned by the defendant bank, having been assigned to it on 25th June, 1963. The plaintiff company, which was incorporated in Singapore on 28th February, 1933, carries on the business of Raffles Hotel.

The land in question had originally been leased as from 1st January, 1926 for a period of 70 years by W. J. Mayson and Mirza Mohamed Ali Namazie, the then trustees of the estate of Syed Ahmad bin Abdulrahman Alsagoff (deceased), to Arshak Sarkies and Martyrose Sarkies Arathoon by a lease dated the 31st December, 1925 (hereinafter referred to as "the 1925 lease"). These two lessees later became insolvent and, in July, 1933, the 1925 lease, subject to all the covenants and conditions contained therein, was assigned by the various interested parties, including the Official Assignee, to the

* *ante* p. 60.

plaintiff company for the remaining 63 years.

On 25th June, 1963 the defendant bank acquired the leasehold reversion of the said land subject to and with the benefit of the 1925 lease.

In short, the defendant bank is now the lessor of the said property and the plaintiff company is the lessee.

Clause 14 of the 1925 lease provided as follows:—

"14. Not without the previous licence in writing of the lessors to assign or sublet the said premises or any part thereof such licence not to be unreasonably withheld Provided nevertheless that (a) if the assignee or sub-lessee be a limited company no consent shall be given unless the articles contain a provision that from time to time during the continuance of this demise the lessors shall have power to appoint a director not subject to retirement by rotation, but any director so appointed shall not be a person interested in or connected with any business of a similar nature to the lessees (b) in the case of a sub-lease no consent shall be given unless the sub-lessee shall become tenant of the lessors at the rent hereby reserved."

In purported pursuance of this clause, the articles of association of the plaintiff company provided by article 77 thereof as follows:—

"77. (i) The lessors to the company of part of the property known as Raffles Hotel Singapore under a lease dated the 31st day of December 1925 and made between William Joseph Mayson and Mirza Mohamed Ali Namazie of the one part and Arshak Sarkies and Martyrose Sarkies Arathoon of the other part and the survivor of them and their or his assigns for the time being lessors of the said property may from time to time so long as the property so leased is held by the company appoint himself or one of themselves or any other person to be a director of the company and may from time to time remove any director so appointed and appoint another in his stead and John Harold Phillips, chartered accountant of Singapore shall be deemed to have been appointed pursuant to this power.

(2) Any such appointment or removal shall be in writing served on the company and signed by the persons authorised to make the appointment or removal or by their or his agent authorised in writing."

On 11th June, 1964 the defendant bank appointed itself a director under the provisions of the above article.

It is admitted by the defendant bank that it holds or owns 999,996 out or 1,000,000 fully paid up shares in the Malayan Finance Corporation Ltd., and that the Malayan Finance Corporation Ltd. holds 2,725,293 out of 3,999,989 fully paid up shares in the Goodwood Park Hotel Ltd.

The plaintiff company contends that article 77 above does not confer any contractual rights on the defendant bank to appoint itself a director of the plaintiff company.

The plaintiff company also contends that the defendant bank cannot be appointed director because it is a "person interested in or connected with any business of a similar nature" to the plaintiff company.

It is further contended that the articles of association of the plaintiff company do not set out the necessary machinery to enable the defendant bank to act as a director of the plaintiff company.

The plaintiff company therefore claims —

(i) a declaration that article 77 of the plaintiff company's articles of association must be read in conjunction with clause 14 of the lease dated 31st December 1925 made between William Joseph Mayson and Mirza Mohamed Ali Namazie of the one part and Arshak Sarkies and Martyrose Sarkies Arathoon of the other part.

(ii) A declaration that the defendant bank's appointment as a director of the plaintiff company made on the 11th June 1964 pursuant to article 77 of the plaintiff company's articles of association is in breach of clause 14 of the 1925 lease and thus invalid.

(iii) Alternatively, a declaration that the defendant bank cannot act as a director of the plaintiff company and an injunction to restrain the defendant bank from purporting to act as such director.

The defendant bank, while admitting most of the salient facts, disputes the contentions set out above.

The relationship between the lessors and the lessees, from the inception of the lease, pursued a friendly course, and, after the insolvency of the original lessees, a company known as Raffles Hotel Ltd. was formed in 1933 which, later that year, obtained an assignment of the 1925 lease. It should here be noted that article 77, and indeed all the articles of association of the plaintiff company, preceded the plaintiff company's acquisition of the lease by some four months. Clause 14 of the 1925 lease therefore did not affect the plaintiff company until four months after it had been formed, and it is therefore small wonder, perhaps, that a difference exists between clause 14 and article 77.

Presumably, when the articles were first drafted negotiations were already afoot for the acquisition of the 1925 lease by the plaintiff company to take effect at some date after its formation, and some, if not sufficient thought, was given to the exact implications of clause 14 of the lease. Perhaps those responsible for article 77 did not have the foresight to visualise the acquisition of the reversion of the leasehold property by persons who might wish to appoint a director who might be a person interested in or connected with business of a similar nature to that carried on by the plaintiff company or, at least, the possibility that such a person might be appointed. I do not think that the plaintiff company ever contemplated that a limited company would one day stand in the shoes of the

lessors and wish to appoint itself a director on the plaintiff company's board. It is also significant that W. J. Mayson, who was one of the original lessors mentioned in the 1925 lease, was also a subscriber to the memorandum and articles of association of the plaintiff company in which he agreed to take one share. This perhaps important factor passed unnoticed by counsel on both sides. One would have thought that as one of the lessors who had been a party to the 1925 lease, he would have insisted on article 77's complying more exactly with the terms of clause 14 of the lease.

The fact that he did not, seems, to my mind, to indicate that he, at least, never seriously anticipated the possibility that the assigns and successors of the lessors might wish to appoint, as a director, some person interested in or connected with any business of a similar nature to that of the plaintiff company or that any person other than a human being would be appointed director. If he were alive today he would, no doubt, be considerably amazed, if not bemused, by the turn of affairs which has brought about the present unhappy impasse in the hitherto cordial relationship between lessors and lessees.

I now turn to the law and the first question I have to decide is whether article 77 confers any contractual right on the defendant bank to appoint itself a director to serve on the plaintiff company's board.

Section 22(1) of the Companies Ordinance (Cap. 174) provides as follows:—

"22. (1) Subject to the provisions of this Ordinance, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member his executors and administrators to observe all the provisions of the memorandum and of the articles."

It has been held in relation to the corresponding provision in the United Kingdom that the articles of association are a contract between the shareholders *inter se* and do not create any contract between a person who is not a party to them and the company (vide *Eley* v. *The Positive Government Security Life Assurance Co. Ltd.*[1]).

In the later case of *Browne* v. *La Trinidad*,[2] Lindley L.J. said —

"Having regard to the construction put upon section 16 of the Companies Act of 1862 in the case of *Eley* v. *Positive Life Assurance Company*, and subsequent cases, it must be taken as settled that the contract upon which he relies is not a contract upon which he can maintain any action, either on the common law side or the equity side. There might have been some difficulty in arriving at that conclusion if it had not been for the authorities, because it happens that this gentleman has had shares allotted to him, and is therefore a member of the company. Having regard to the terms of section 16, there would be some force, or at all events some plausibility, in the argument that, being a member, the contract which is referred to in the articles has become binding between the company and him. Of course that argument is open to this difficulty that there could be no contract between him and the company until the shares were allotted to him, and it would be remarkable that, upon the shares being allotted to him, a contract between him and the company, as to a matter not connected with the holding of shares, should arise. There are difficulties in the construction of section 16 of the Act of 1862, but those difficulties have been removed by the authorities, which shew that Browne has no contract with the company which he can enforce either at law or in equity."

In *Hickman* v. *Kent*,[3] Astbury J. said —

"An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contracts between himself and the company to enforce those rights. Those rights are not part of the general regulations of the company applicable alike to all shareholders and can only exist by virtue of some contract between such person and the company, and the subsequent allotment of shares to an outsider in whose favour such an article is inserted does not enable him to sue the company on such an article to enforce rights which are *res inter alios* acts and not part of the general rights of the corporators as such."

The case that seems closest on the facts to the case before me is *British Murac Syndicate, Ltd.* v. *Alperton Rubber Co., Ltd.*[4] where the head note reads as follows:—

"By an agreement binding on the defendant company it was provided that so long as the plaintiff syndicate should hold 5,000 shares in the defendant company the plaintiff syndicate should have the right of nominating two directors on the board of the defendant company. A clause to the same effect was contained in article 88 of the defendant company's articles of association. Another article provided that the number of directors should not be less than three nor more than seven. The plaintiff syndicate had recently nominated two persons as directors. The defendant company objected to these persons as directors and refused to accept the nomination, and a meeting of the shareholders was called for the purpose of passing a special resolution under the Companies (Consolidation) Act, 1908, section 13, cancelling article 88:—

Held: that the defendant company had no power to alter its articles of association for the purpose of committing a breach of contract and that an injunction ought to be granted to restrain the holding of the meeting for that purpose."

It should be observed that in that case there was in existence a binding contract between the defendant company and the plaintiff syndicate entitling the latter to nominate two directors on the Board of the defendant company. In the case before me, I have to consider whether there is any binding contract which entitles the defendant bank to nominate a director on the plaintiff company's board. It was argued by Mr. Hill, counsel for the defendant bank, that there was such a contract contained in the articles themselves. If such a contract was not so contained, then, I was invited to consider that such a contractual right was contained in clause 14 of the 1925 lease.

In my opinion neither the *British Murac case, supra,* nor *In re Anglo-Austrian Printing & Publishing Union* [5] (*Isaacs' case*) assists this contention because in both those cases the courts found that there was a binding contract on the part of the company concerned to accept the two nominated directors or to remunerate the director concerned, respectively, in accordance with the articles.

In the present case I can find no such binding contract, either in any prior agreement binding on the plaintiff company, or in its articles. There appears to be nothing in the articles which confers any such right on the defendant bank. As Astbury J. said in *Hickman* v. *Kent, supra,* at p. 900.

"I think this much is clear, first, that no article can constitute a contract between the company and a third person; secondly, that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, can be enforced against the company; and, thirdly, that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively."

As *Palmer* says at page 115 of the 20th Edition of his tome on Company Law, it is not easy to reconcile the rule laid down in the *Eley, Browne* and *Hickman cases, supra,* with section 22 of the Companies Ordinance which expressly provides that the memorandum or articles bind the company and members thereof

"but they must be taken to have settled the law in this respect. The effect of these decisions is that the implied covenant only binds the members to observe such of the provisions of the articles as concern their rights, privileges, powers and obligations as members.

Finding a difficulty in applying the above rule consistently with justice the courts have in some cases acted on the footing that a clause in the articles, not dealing with the rights of a member as such, but apparently intended to operate as a contract with him, is to be regarded as the basis of a contract, i.e. as indicating the terms on which the company proposes to contract with him, and that, if the parties enter into the relations contemplated by the clause, they are to be treated as having made a contract in the terms of the clause and are bound accordingly. This is illustrated by *Swabey* v. *Fort Darwin Cold Mining Co.* In that case the articles provided for the payment to each director by way of remuneration of a specified sum *per annum.* By a special resolution, in July, the company reduced this as from the end of the preceding year. The plaintiff thereupon resigned, and sued the company for three months' remuneration for services prior to the date of his resignation; and the court held that he was entitled to recover on the footing of an implied contract in the terms of the clause. 'The articles', said Lord Esher, 'do not themselves form a contract, but from them you get the terms upon which the director is serving.' This proposition was adopted by Stirling J. in *Re International Cable Co.,* and by Wright J. in *Ex parte Beckwith.* Moreover, the principle involved is not confined to members, it extends also to outsiders, e.g., to persons who take office as directors. If a contract is implied in this way a person who has acted in accordance with it cannot be deprived, by an alteration of the articles, of rights accrued thereunder. But a change of articles would in many instances, it is submitted, be valid to alter the terms of the implied contract for the future, at least after a period of reasonable notice."

It is noteworthy that Professor *Gower* in his 2nd Edition of Modern Company Law does not appear to deal with this situation in the same terms. In fact, he says at page 254 that "it seems clear that the articles can only be a contract in so far as it affects members in their capacity of members".

I was at one stage attracted by the illuminating observations set out from *Palmer* above with a view to applying them to the facts of the present case. W. J. Mayson was a subscribing member to both the memorandum and the articles of the plaintiff company. He was one of the original lessors. Was article 77 therefore intended to operate as a contract with him? In the past, no doubt, such appointments had been made and accepted by the plaintiff company as valid. For example, the validity of Mr. Leslie Rayner's appointment as a director by the defendant bank was not challenged in Suit No. 848 of 1964. However, on a later objection, in that suit, to his wanting to inspect the plaintiff company's accounts, he was removed by the defendant bank from his office. From this fact of acceptance of directors in the past, it may be argued that article 77 was intended to operate as a contract with the lessors and their assigns. In the present case, there has been active opposition, by this action, to the appointment by the defendant bank of itself as a director of the plaintiff company and, in the circumstances, it is difficult to hold that the parties have mutually entered into the relations contemplated by the articles. The cases cited by *Palmer* above deal mainly with articles providing for the terms upon which a director is required to serve and if he has, in fact so served, then they hold that he was entitled to be paid for his services in accordance with the specified rates set out in the articles. Where the remuneration was not fixed by the articles no such contract was implied (see *Ex parte Cannon* [6]). I am therefore unable to hold that article 77 operates as a contract with the lessors and their assigns and propose to apply the rule laid down in the earlier cases, commencing with the *Eley case,* which *Palmer,* himself, says must be taken to have settled the law in this respect.

Another question that remains to be decided is whether clause 14 of the lease can be said to constitute an agreement which is binding on the plaintiff company so as to entitle the defendant bank to appoint a director on its board. In my opinion, clause 14 does not confer or impose any such contractual right or obligation on either the lessors or the lessees in the particular circumstances envisaged therein. It is not an

absolute covenant but merely one which is conditionally binding on the lessees (vide *Treloar* v. *Bigge* [7]). They cannot assign or sublet the property in question without the consent of the lessors. This clause merely provides that the lessors can withhold their consent if, in the case of lessees, who are a limited company, provision is not made in the latter's articles for the lessors to nominate a director on the lessees' board. It also imposes a disqualification on a director so appointed.

It seems to me therefore that, unless such consent is required, no such provision need be made. It is not as though the lessors had been given an unqualified and absolute right to nominate a director on the lessees' board in any circumstances whatsoever.

It is therefore unnecessary for me to consider whether the lessors can appoint as director a person who may be interested in or connected with a similar business to that of the lessees.

If necessary, I would be prepared to hold, on the facts before me, that the defendant bank is in fact interest in or connected as aforesaid. There can be little doubt that the defendant bank has an interested in the Goodwood Park Hotel Ltd. It holds nearly all the shares in the Malayan Finance Corporation which hold 68% of the shares in Goodwood Park Hotel Ltd. If this is not an interest in or connexion with business of a similar nature to that of Raffles Hotel Ltd. I should be very much surprised to know what else it can be. Mr. Khoo Teck Puat, who is the managing director of the defendant bank and chairman of the board of directors of Goodwood Park Hotel Ltd., was called to give evidence on behalf of Raffles Hotel Ltd. Only Mr. Teh, counsel for the latter, can explain adequately why he was called at all for the plaintiff company, as it was obvious that he was, not unnaturally, biassed in favour of Goodwood Park Hotel which he claimed was the best hotel in Singapore catering for a higher class of customer than Raffles Hotel. I have no doubt at all in my mind that the defendant bank was disqualified under clause 14 from acting as a director, even if it had a right to make such an appointment under article 77, which I have decided it did not have.

In *Lapiah* v. *Braithwaite* [8] it was held by the House of Lords that a shareholder has an indirect interest in contracts entered into by companies of which he is a member. Obviously he has a direct interest in the companies themselves.

In *Todd* v. *Robinson* [9] it was held that a shareholder in a company having a contract with a local board is interested in a bargain or contract with the board so long as the contract exists and is capable of producing profit to the shareholders and that it really does not make any difference whether the words "directly or indirectly" are added. An indirect interest amounting to an indirect participation in profits would suffice.

In *Gophir Diamond Co.* v. *Wood*,[10] Swinfen Eady J. held that a covenant prohibiting the defendant from being interested, directly or indirectly, in a similar business prohibited him in the sense that he must not have a proprietary or pecuniary interest in the success or failure thereof.

The defendant bank, in my opinion, clearly has an interest, or, at least an indirect interest, in this sense, in Goodwood Park Hotel Ltd., because, if the latter were to make profits or sustain losses, these would be reflected in the financial returns of Malayan Finance Corporation which is, to all intents and purposes, wholly owned by the defendant bank. In the circumstances I fail to see how it can be said that the latter has no such interest in Goodwood Park Hotel Ltd. within the definitions of "interest" referred to above.

It remains for me to add that although there appears to be no fundamental objection to a limited company's acting as a director of another company, it seems desirable that the mechanics of its so acting should be spelt out in the articles so as to enable a representative thereof to act in its place. If, as is the position, provision has been specifically made for the procedure for representation and voting by a member who is a limited company at a general meeting of another company, it seems only logical and desirable that provisions should similarly be made for it to act as director thereof.

In this case I do not have to decide whether such machinery should have been provided in view of the fact that I have decided that the defendant bank cannot and should not act as a director of the plaintiff company, on other grounds.

Judgment will therefore be entered, with costs, for the plaintiff company to the effect that the defendant bank's appointment of itself as director is invalid.

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